Supreme Court, U.S.
FILED

(2) 001445 MAR 9 2001

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IN THE
SUPREME COURT of the UNITED STATES

Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners

vs.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA);BRADLEY M. CAMPBELL, Regional Administrator, Region III, U.S. EPA;
Respondents

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

SUPPLEMENTARY APPENDIX

Janice Haagensen
Counsel of Record
349 New Road
Enon Valley, PA 16120
Tel: (724) 336-5962
Attorney for Petitioners
Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al., Plaintiffs	)	
vs.	)	Civil Action No. 95-342 Erie
WILLIAM R. COOMBS, et al., Defendants	)	

MEMORANDUM OPINION

McLAUGHLIN, J.

This case involves allegations by Plaintiffs Robert W. Grine, II, Joanne D. Grine and Mrs. Margaret Grine that Defendants,[1] several public and private entities, are responsible for contamination of the Grines' property. The Amended Complaint, filed April 2, 1996, asserts nine causes of action against Defendants, including federal claims under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901, et seq., the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251, et seq., and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 et seq., as amended

[1] The named Defendants are: William R. Coombs; Billie M. Yost; Jack W. Shrum, et ux.; Rotocast Plastic Products, Inc.; Essex Environmental Industries, Inc.; Tionesta Borough; Ronald Hall individually and in his official capacity as President of the Tionesta Borough Council; Scott Daum, individually and in his official capacity as Borough Manager; Commonwealth of Pennsylvania, Department of Environmental Protection; Gary Wozniak, individually and in his official capacity as an agent of the Pennsylvania DEP; Daniel Holler, individually and in his official capacity as Emergency Response Coordinator for the Pennsylvania DEP; United States of America Environmental Protection Agency; and Michael McCabe, Regional Administrator, Region III, for the United States EPA.

by the Superfund Amendments and the Reauthorization Act of 1986.[2] The Amended Complaint also asserts causes of action under Pennsylvania common law theories of intentional infliction of emotional distress, trespass, nuisance, and strict liability, as well as an alleged violation of the Pennsylvania Hazardous Sites Cleanup Act ("PHSCA"), 35 Pa. Stat. Tit. 35, § 6020.101 et seq. (Purdons 1993 and 1996 Supp.).

Presently pending before the court is a motion to dismiss filed on behalf of Defendants the Commonwealth of Pennsylvania Department of Environmental Protection ("DEP"), Gary Wozniak, and Daniel Holler (collectively, the "Commonwealth Defendants"). For the reasons stated below, we will grant the motion to dismiss.

I. BACKGROUND

The Court will outline only those allegations relevant to the claims against the Commonwealth Defendants, except where a broader background discussion is helpful for context.[3]

A. The Parties

Plaintiff Robert W. Grine, II is a resident of Tionesta Borough, Pennsylvania. (Amended Complaint, hereinafter "AC," at ¶ 4.) Plaintiff Joanne D. Grine is his wife and Plaintiff Margaret M. Grine is his mother. (Id. at ¶¶ 5-6.) The Grines reside together on a tract of property located

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[2] Plaintiffs also asserted a claim against the United States Environmental Protection Agency and its Region III Director, Michael McCabe, under the Freedom of Information Act, 5 U.S.C. § 552. The Court has addressed Plaintiffs' claims against the EPA and McCabe by way of a separate Memorandum Opinion and Order.

[3] For purposes of Defendants' motion, we construe all allegations in the Complaint as true and draw all reasonable inferences therefrom in the light most favorable to the plaintiff.

adjacent to what they allege is an illegal open dump site. (Id. at ¶¶ 4-6.)

Defendant William R. Coombs ("Coombs") is the landowner of record holding title to the camp site and cabin adjacent to the Grines' property. (AC ¶ 15.) It is this property which is alleged to be the source of an illegal hazardous waste disposal site (the "Site"). (Id.) Defendant Billie M. Yost ("Yost") is the daughter of William Coombs and is the current title holder of record of a tract of property located adjacent to the Grines' property and previously owned by Coombs. (Id. at ¶ 16.) Defendant Jack W. Shrum, et ux. ("Shrum") is also the title holder of a tract of property located adjacent to the Grines' property and previously owned by Coombs. (Id. at ¶ 17.)

Defendant Rotocast Plastic Products, Inc., Wonder Products Division ("Rotocast") is a corporate successor in interest to Essex Environmental Industries, Inc. and is alleged to have participated in the handling, storage, transportation, treatment and/or disposal of solid waste at the Coombs site. (AC ¶ 7.)

Defendant Daniel Holler ("Holler") is the Emergency Response Coordinator of the Northwest Region of the Pennsylvania Commonwealth Department of Environmental Protection ("DEP"). (AC ¶ 10.) Defendant Gary Wozniak ("Wozniak") is the DEP agent allegedly in charge of investigating the Grines' complaint filed with the DEP. (Id. at ¶ 11.) Plaintiffs have also named the DEP itself as a Defendant in this case. (Id. at ¶ 9.) We refer to these Defendants collectively as "the Commonwealth Defendants."

Defendant Scott Daum ("Daum") is the Borough Manager of Tionesta Borough Council. (AC ¶ 13.) Defendant Ronald Hall ("Hall") is the President of Tionesta Borough Council. (Id. at ¶ 14.) Plaintiffs have also named

the Tionesta Borough Council as a Defendant in this action. (Id. at ¶ 12.)

B. The Alleged Operative Facts

The essence of Plaintiffs' Amended Complaint is that hazardous waste has been illegally transported, stored, handled, and/or disposed f on Coombs's property (recently conveyed to Yost and Shrum) and has migrated through surface and subsurface water and soil to the Grines' property, causing them both personal harm and property damage. (See AC ¶ 18.)

In the spring of 1993, Robert and Joanne Grine allegedly observed approximately one-half dozen yellow plastic drums sitting in plain view on the camp site owned by Coombs. (AC ¶ 19.) Plaintiffs claim that, in June and July 1994, Robert Grine notified the Pennsylvania Department of Environmental Resources ("DER")[4] and members of the Tionesta Borough Council that raw sewage was draining from the Coombs's property onto his property via a pipe connected to a toilet in the Coombs's cabin. (Id. at ¶ 20.) In addition, Robert Grine allegedly notified the DER on August 13, 1994 that a mass of foaming liquid had surfaced out of his wet-weather spring, traversing his entire property. Plaintiffs noticed, approximately ten days thereafter, that vegetation and small animals were dying in close proximity to the path of the spill. (Id. at ¶ 22.)

In October, 1994 Plaintiff Robert Grine submitted water samples from his wet-weather spring to an independent testing operation by the name of Stewart Laboratories of Strattanville, Pennsylvania. (AC ¶ 23.) Plaintiffs claim that some 58 volatile organic chemicals were found to be present in heavy concentrations in the samples. (Id.) According to Plaintiffs, personnel from Stewart

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[4] The Department of Environmental Resources was officially renamed the "Department of Environmental Protection" effective July 1, 1995. See PA. STAT. ANN. tit. 71, § 1340.501 (Purdons 1996 Supp.).

Laboratories advised that the Grines had an extremely dangerous situation on their property and directed Robert Grine to inform the DER and the county emergency manager that an emergency response should be initiated. (Id. at ¶ 24.) Mr. Grine did so and, approximately four to five days later, agents of the DER arrived at the Site. (Id. at ¶ 25.) Plaintiffs allege that, in the interim, Defendant Wozniak threatened Robert Grine with a retaliatory prosecution if Plaintiffs insisted in filing their complaint and insisted on initiating a site investigation. (Id.)

Plaintiffs claim that, on or about October 4, 1994, Defendant Wozniak videotaped a yellow plastic drum and lid in plain view on the Coombs site. (AC ¶ 26.) Embossed on the drum and lid were a designation "DOT-E9775" and the name and address of Essex Environmental Industries, Inc.. (Id.)

Plaintiffs further claim that, on or about November 22, 1994, Agent Wozniak informed them that one of the yellow plastic drums had been dragged by Defendant Coombs into his cabin, where it was in use as a water reservoir that flushed a primitive toilet inside Coombs's cabin. (AC ¶ 27.) One of several pipes running from the toilet allegedly emptied into a septic tank with no leach field and discharged directly onto the Grines' property. (Id. at ¶ 28.)

Plaintiffs claim that they requested they DER, through Agent Wozniak, to prevent the use of these barrels to discharge hazardous chemicals and sewage directly onto their property. (AC ¶ 29.) Meanwhile, the Grines allegedly suffered symptoms of physical distress, impaired quality of life, and destruction to their property as a result of the contamination of their property. (Id. at 30.)

Plaintiffs claim that, on or about June 1 and June 7, 1995, the barrels on the Coombs property were filled with fluids which foamed over the sides of the barrels and

blackened the ground on the Coombs property. (AC at ¶ 33.) They state that, with every heavy rainstorm throughout the Spring and Summer of 1995, liquid waste would rise up from the Grines' spring and flood their back yard, creating a stench which would invade their home. (Id. at ¶ 34.)

On July 5, 1995, Robert Grine allegedly informed Agent Wozniak that the barrels were being moved off the Coombs camp site by Coombs and others, using a cable and winch. (AC ¶¶ 31-32.) Plaintiffs claim that, during this conversation, Agent Wozniak denied ever having seen any barrels on the Coombs site. (Id. at ¶ 32.)

On February 9, 1995 a criminal investigator for the United States EPA arrived at the Coombs site and allegedly inspected the lid of the drum bearing the mark "DOT-E9775." (AC at ¶ 36.) The EPA released to Plaintiffs the results of testing done on samples taken from barrels on the Coombs site in a report dated March 17, 1995. According to Plaintiffs', the results of these tests showed the presence of the same chemicals detected in heavy concentrations by Stewart Laboratories in samples taken from the Grines' spring water. (Id. at ¶ 38.) Nevertheless, the EPA concluded its investigation with a determination that no remediation of the Grines' property was necessary. (Id. at ¶ 35.)

On or about June 29, 1995, agents of the Pennsylvania DER allegedly supervised a private contractor, Mr. Shaun Passauer, in the removal of contaminated soil from the Coombs site. (AC ¶ 41.) Plaintiffs claim that Mr. Passauer removed the soil with a backhoe, pushed barrels and other debris into waste piles, and graded the slope from the Coombs property so that all the runoff would be channelled directly onto the Grines' property. It is alleged that various Borough employees were present and the events were videotaped by the DER. Plaintiffs aver that contaminated soil and drums were removed from the Coombs site in the presence of DER and Borough officials and transported without a permit to unknown locations. (Id.)

On August 25, 1995, agents of the DER appeared at Plaintiffs' home without any attempt to contact their counsel and urged immediate entry onto Plaintiffs' property in order to remediate the contaminants on the property. (AC at ¶ 42.) Plaintiffs complaint that, in a "draft" version of a Hazardous Sites Cleanup Act Response Justification Document dated August 29, 1995, the Pennsylvania DEP named Plaintiff Robert Grine as a potentially responsible person and also identified him as a current and past "Site owner." (Id. at ¶ 43.) Plaintiffs claim that Defendant Coombs, Yost, Shrum, and Rotocast are not alluded to by name anywhere in the document and are not identified as "Site owners." (Id.)

Plaintiffs aver that Defendants Coombs, Yost, Shrum, and Rotocast have acted to create, implement, operate and fuel a "chemical buriel [sic] ground[]" adjacent to Plaintiffs' home, with the intent to physically injure Plaintiffs and cause them severe emotional distress and a complete disruption of their daily lives. (AC ¶ 45.)

II. STANDARD OF REVIEW

In evaluating Plaintiffs' claims for purposes of a motion to dismiss under Fed. R. Civ. P. 12(b) (6), the Court must accept as true all material allegations of the complaint and draw all reasonable inferences therefrom in the light most favorable to the Plaintiffs. Rocks v. City of Philadelphia, 868 F.2d 644, 647 (3d Cir. 1989). We thus consider "whether relief could be granted . . . 'under any set of facts that could be proved consistent with the allegations' in [the] complaint." Gasoline Sales, Inc. v. Aero Oil co., 39 F.3d 70, 71 (3d Cir. 1994) (quoting National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 114 S. Ct. 798, 803 (1994)). If no cause of action can be identified, dismissal is proper.

Dismissal under Fed. R. Civ. P. 12(b) (1) for lack of subject matter jurisdiction is appropriate only if the right claimed is "so insubstantial, implausible, foreclosed by prior

decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Growth Horizons, Inc. v. Delaware County, Pa., 983 F.2d 1277, 1280-81 (3d Cir. 1993) (citations omitted). "The threshold to withstand a motion to dismiss under Fed. R. Civ. P. 12(b) (1) is thus lower than that required to [with]stand a Rule 12(b) (6) motion." Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989). See also Bonnett Enterprises, Inc. v. United States, 889 F. Supp. 208, 209-10 (W.D. Pa. 1995). The plaintiff generally bears the burden of persuasion on a motion under Rule 12(b) (1). Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir.), cert. denied, 501 U.S. 1222 (1991).

III. DISCUSSION

The Commonwealth Defendants put forth several bases for dismissal of the Amended Complaint. Specifically, they assert that: (A) they are immune from suit (whether based on federal or state law claims) in federal court by virtue of the Eleventh amendment to the U.S. Constitution; (B) the Plaintiffs have stated no cause of action under federal law and, therefore, this Court is without subject matter jurisdiction; (C) the Plaintiffs failed to satisfy the notice of suit jurisdictional prerequisites under RCRA, the Clean Water Act, and CERCLA; and (D) the Amended Complaint fails to comply with the Federal Rules of Civil Procedure.

A. Eleventh Amendment Immunity[5]

We first consider whether some of all of the Commonwealth Defendants are immune from suit under the

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[5] While the plaintiff generally bears the burden of establishing this Court's jurisdiction on a motion to dismiss under Fed. R. Civ. P. 12(b) (1), see supra at II, a party asserting Eleventh Amendment immunity (and standing to benefit from its protection) bears the burden of proving the applicability of that doctrine. Christy v Pennsylvania Turnpike Comm'n., 54 F.3d 1140, 1144 (3d Cir. 1995), cert. denied, __ U.S. __, 116 S. Ct. 340 (1995). Thus, in the instant case, the Commonwealth Defendants bear the burden of proving their entitlement to protection under the Eleventh Amendment.

Eleventh Amendment to the United States Constitution. The Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Constitution, Amendment XI.[6] ""The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (citing Hans v. Louisiana, 134 U.S. 1, 13 (1980)). In fact, "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." Id. (quoting In re Ayers, 123 U.S. 443, 505 (1887)).

The Commonwealth Defendants correctly summarize the law in state that there are only two situations in which a state may be sued in federal court, consistent with the Eleventh Amendment: (1) where the State has waived its immunity and consented to suit, Puerto Rico Aqueduct & Sewer Auth., 506 U.S. at 144; Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 473 (1987) (plurality opinion); Clark v. Barnard, 108 U.S. 436, 447 (1983); and (2) where Congress has unequivocally expressed its intent to abrogate Eleventh Amendment immunity,

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[6] Although the Amendment refers only to suits against states brought by citizens of different or foreign states, it is now well established that this immunity applies also to suits brought by citizens of the defendant state. See, e.g., Puerto Rico Aqueduct & Sewer Auth. V. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 97-98, 100 (1984); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974).

pursuant to a valid exercise of power. See Seminole Tribe of Florida v. Florida, __ U.S. __, 116 S. Ct. 1114, 1123 (1996); Welch, 483 U.S. t 473-74; Atascadero State Hosp. V. Scanlon, 473 U.S. 234, 242 (1985).

1. Plaintiffs' Federal Claims

Turning first to Plaintiffs' federal claims, we find that the first situation does not pertain because there has been no waiver by the Commonwealth of its Eleventh Amendment immunity with respect to these claims. See 1 PA. CONS. STAT. ANN § 2310 (1995) ("[I]t is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity."); 42 PA. CONS. STAT. ANN. § 8521(b) (1982) ("Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.")

The second situation -- where Congress has acted to abrogate sovereign immunity -- also does not pertain here. This inquiry actually involves two questions: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' ... and second, whether Congress has acted 'pursuant to a valid exercise of power.'" Seminole Tribe of Florida v. Florida, 116 S. Ct. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)). We think that, far from expressly abrogating Eleventh Amendment immunity, Congress specifically recognized and preserved such immunity in the "citizen suits" provisions of RCRA, CERCLA, and CWA. All three of these acts contain provisions for citizen suits against "persons." Further, each act's "citizen suits" provision defines "persons" who may be sued as including "any ... governmental instrumentality or agency, *to the extent permitted by the eleventh amendment to the*

Constitution." See 42 U.S.C. §§ 6972(a) (1) (RCRA) and 9659(a) (1) (CERCLA); 33 U.S.C. § 1365(1) (CWA) (emphasis supplied). This wording indicates that Congress did not intend to override Eleventh Amendment immunity in creating a mechanism for private suits under these statutes. See Pennsylvania v. Union Gas Co., 491 U.S. 1, 10 (1988) (plurality opinion) (recognizing Congress's reservation of Eleventh Amendment immunity in citizens suit provision of CERCLA), overruled on other grounds, Seminole Tribe, 116 S. Ct. at 1128.

In any event, following the United States Supreme Court's decision in Seminole Tribe, it would appear that any Congressional abrogation of Eleventh Amendment immunity under RCRA, CWA, and CERCLA would be an invalid exercise of federal power. In Seminole Tribe, the Supreme Court considered whether a federal court had jurisdiction over a suit brought by the Seminole Indian Tribe against the State of Florida and its Governor under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq.. That statute, enacted pursuant to the Indian Commerce Clause of Article I of the U.S. Constitution, provides that an Indian tribe may conduct certain gaming activities only in conformity with a valid compact between the tribe and the State in which the gaming activities are located. In Seminole Tribe, the Tribe had filed suit seeking to compel the State of Florida and its Governor to negotiate in good faith toward entering into such a compact. The defendants moved to dismiss the complaint on the ground that the suit violated the State's sovereign immunity from suit in federal court. Upon interlocutory appeal from the district court's denial of the motion to dismiss, the Eleventh Circuit Court of Appeals held that the Eleventh Amendment barred the suit.

The Supreme Court affirmed the Seventh Circuit's decision and held that, notwithstanding the clear expression of Congressional intent to abrogate the States' Eleventh Amendment immunity in the Indian Gaming Regulatory Act, Congress had not acted pursuant to a valid exercise of

power in attempting to do so. The Tribe argued that, consistent with the court's prior ruling in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), Congress could validly exercise its powers under the Indian Commerce Clause so as to render States subject to suit under the Act. In Union Gas, a plurality of the Court had held that Congress could abrogate state sovereign immunity in legislation enacted under the Interstate Commerce Clause of Article I of the U.S. Constitution. The Union Gas Court reasoned that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages." 491 U.S. at 19-20. The Petitioners in Seminole Tribe urged the Court to follow its prior ruling in Union Gas and uphold the Indian Gaming Regulation Act's abrogation of sovereign immunity pursuant to the Indian Commerce Clause of Article I. The Court in Seminole Tribe acknowledged that "Union Gas allows no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause." 116 S. Ct. at 1127. Nevertheless, the Court determined that the decision in Union Gas had been decided wrongly and should be overruled. Id. at 1128. The Court noted that, prior to Union Gas, it had previously found Congressional power to abrogate the States' sovereign immunity only under the Fourteenth Amendment. The Court pointed out that the rationale for finding this authority within the fourteenth amendment was "wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and ratification of the Constitution, operated to alter the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment." 116 S. Ct. at 1128. The Court concluded that the Tribe's suit should be dismissed for lack of federal jurisdiction and "reconfirmed" that:

> the background principle of state sovereign immunity embodied in the Eleventh amendment is not so ephemeral as to dissipate

> when the subject of the suit is an area, like the regulation of Indian Commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, *and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.*

116 S. Ct. at 1131-32 (internal footnote omitted) (emphasis supplied).

Applying Seminole Tribe to this case, there can be no valid abrogation of Eleventh Amendment immunity under RCRA, CWA or CERCLA. The Commonwealth Defendants note, and Plaintiffs do not disagree, that each of these statutes were enacted pursuant to Congress's authority under the Interstate Commerce Clause. See e.g., Union Gas, 491 U.S. at 13 (Congressional power to enact CERCLA provisions derives from the Commerce Clause); U.S. Ashland Oil & Transportation Co., 504 F.2d 1317, 1325-29 (6th Cir. 1974) (Congressional authority to prohibit discharge of pollutants under the CWA into navigable waters derives from the Commerce Clause). In light of Seminole Tribe's teaching that Congress lacks the power to abrogate Eleventh Amendment immunity under the Commerce Clause -- and, as there has not otherwise been any waiver by the Commonwealth of its sovereign immunity -- this Court lacks jurisdiction over any claims against the Commonwealth that are premised upon the citizen suits provisions of RCRA, CERCLA, or CWA. Accordingly, the DEP, which is merely an arm of the Commonwealth, is protected by Eleventh Amendment immunity and is outside this Court's jurisdiction. See Fiore v. Kelly run Sanitation, Inc., 609 F.

Supp. 909, 912 (W.D. Pa. 1985) ("We recognize that the state DER, an agency of the state itself, may not be sued in federal court unless the state has waived its Eleventh Amendment immunity or Congress has subjected states to suit pursuant to Section 5 of the Fourteenth Amendment.")

Plaintiffs argue that the citizen suits provision of RCRA, 42 U.S.C. § 6972(a), grants federal courts exclusive jurisdiction over claims brought pursuant to that section. Thus, Plaintiffs reason, if the eleventh amendment shields state officials who allegedly contribute to the release of hazardous substances from suit in federal court, "persons harmed by state violations of federal law would have no remedy." (Pl.'s Br. In Resp. to Commw. Def.s' Motion to Dismiss at 4.) This argument prompts us to make two observations. First, this Court is not free to disregard the dictates of the Eleventh Amendment even in situations where the plaintiff would otherwise be left without a remedy against a state entity. Indeed, the Supreme court has advised that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area" such that no corresponding state law remedy exists, "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." Seminole Tribe, 116 S. Ct. at 1131. Similarly, even where there is no state forum otherwise available to a plaintiff, we cannot entertain a suit against a state if doing so would violate the Eleventh Amendment. Second, as the Seminole Tribe Court recognized, other methods exist for ensuring state compliance with federal law: e.g. the Federal Government can bring suit against a State, see United States v. Texas, 143 U.S. 621, 644-45 (1892) (finding such power necessary to the "permanence of the Union"); an individual can bring suit against a state officer under certain circumstances in order to ensure that the officer's conduct is in compliance with federal law, see Ex Parte Young, 209 U.S. 123 (1908); and the Supreme Court is empowered to review a question of federal law arising from a state court decision where a State has consented to suit,

Cohens v. Virginia, 6 Wheat. 264, 5 L.Ed. 257 (1821)). See generally, Seminole Tribe, 116 S. Ct. at 1131 n. 14. We conclude that the Eleventh Amendment precludes this Court from exercising jurisdiction over Plaintiffs' federal claims against the DEP.

We next consider whether Defendants Holler and Wozniak are similarly entitled to Eleventh Amendment immunity. "When the suit is brought only against state officials, a question arises as to whether that suit is against the State itself." Pennhurst State School & Hosp. V. Halderman, 465 U.S. 89, 101 (1984). Eleventh Amendment immunity bars suits against state officials when "'the state is the real, substantial party in interest.'" Id. (quoting Ford Motor Co. v. Dept. of Treasury of Indiana, 323 U.S. 459, 464 (1945)). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Hawaii v. Gordon, 373 U.S. 57, 58 (1963) (per curiam) (suit by State of Hawaii against Director of the Bureau of the Budget was one against the United States and, absent its consent, could not be maintained where the requested court order would require the Director to take affirmative official action, would affect the public administration of federal agencies, and would result in the disposition of property belonging to the United States). A suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in effect a suit against the state. Cory v. White, 457 U.S. 85, 89 (1982) (in federal interpleader action filed by estate of Howard Hughes to resolve inconsistent death tax claims by officials of two different states, suit against state tax officials was suit against state and, therefore, barred by doctrine of sovereign immunity). See also Dugan v. Rank, 372 U.S. 609, 620 (1963) {"[A] suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of judgment would be to restrain the Government from acting, or to compel it to act.").

The Commonwealth Defendants argue that Plaintiffs' claims against Holler and Wozniak are, in effect, nothing more than claims against the Commonwealth. Plaintiffs do not seriously contest this issue and, upon review of the Amended Complaint, we must agree with the Defendants' characterization of Plaintiffs' claims. We note, for example, allegations that:

> 10. ... *Daniel Holler [is] the emergency response coordinator of the Northwest Region, employee and agent of the [DEP]* ...
>
> 11. ... *Gary Wozniak [is] the DER/DEP agent who was in charge of investigating Plaintiffs' Complaint* ...
>
> ***
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> 29. *The Grines family requested that the DER in the person of Agent Wozniak* prevent the use of DOT-exempted barrels to discharge hazardous chemicals and sewage directly onto their property.
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> ***
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> 41. On or about June 29, 1995, *agents of the DER/DEP* supervised a private contractor ... who used a backhoe to remove contaminated soil from the Coombs site ... All of these activities were videotaped by *agents of the DER*. Drums and contaminated soil were removed from the Coombs site *in the presence of DER* ... and transported without a permit to unknown locations ...
>
> 42. On August 25 19995, *agents of the DER* appeared at Plaintiffs[']home ... and urged Plaintiff to admit them immediately in order to "remediate" the contaminants on his property.
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> ***
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> 71. *the DER in the persons of Defendants Gary Wozniak and Daniel Holler* through their "hands-on" control of the Site, have contributed to the handling, storage, treatment, transport, or disposal of solid or hazardous waste without a permit.
>
> ***

86. *Plaintiffs seek injunctive relief against the [DEP], Region III, and their agents, servants, employees,* and those persons in active concert or participation with them *in order that the DER cease from its failure to enforce* [42 U.S.C. §6925(a), etc.] ...

87. *[the DEP] ... [is] in continuing violation of Section 301 of the Clean Water Act,* 33 U.S.. § 1311 ...

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95. *The officers, agents and employees of the DER have aided and abetted* Defendants Coombs, Yost, Shrum and Defendant Rotocast Plastics, Inc. in their violations of the CWA ... *The [DEP] and their agents, servants, employees,* and those persons in active concert or participation with them continue in their failure to enforce the applicable provisions of the CWA ...

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103. *The DEP in the persons of Defendant Wozniak and Holler* manifested an unjustifiable and inexcusable disregard for human life and through their conduct placed the Plaintiffs in danger of death or serious bodily harm.

104. *The DEP in the persons of Defendant Wozniak and Holler* significantly encouraged Defendant Coombs, Yost and Shrum and Defendant Rotocast in their illegal storage, transport and disposal of hazardous materials ...

***

136. *The DER in the person of the agent assigned to the Coombs Site, Gary Wozniak, and his supervisor, Daniel Holler,* were operators of a facility as that term is used in CERLCA ... and these agents arranged for the disposal of a hazardous substance at or from the Coombs site on or about June 29, 1995 ...

137. On or about June 29, 1995, agents of the DER actively supervised and videotaped the removal of drums and contaminated soil from the Coombs Site and their transport without a permit to unknown locations.

> *The DER in the person of its agents* arranged for the ultimate disposal of these hazardous materials without a permit. ...
>
> 138. *The DER in the person of its agents* had authority to control the cause of the contamination at the time hazardous substances were released into the environment. *The DER in the person of its agents* on or about June 29, 1995, caused or contributed to the release of a hazardous substance from drums and contaminated soil on the Coombs Site, and is subject to the provisions of CERCLA ...

(Amended Complaint ¶¶ 10, 11, 29, 41, 42, 71, 86, 87, 95, 103, 104, 136, 137, 138 (emphasis supplied).)

These allegations demonstrate that Plaintiffs' claims against Wozniak and Holler are, in effect, claims against the Commonwealth DEP itself. Although Holler and Wozniak are referenced in the caption both "in an individual and official capacity," the averments against them concern alleged actions taken as agents of DEP. The Amended Complaint does not contain any reference to those Defendants specifically acting in an individual capacity. Further, the Amended Complaint clearly equates the actions of Holler and Wozniak with the actions of the DEP itself. The alleged wrongful acts -- i.e. alleged failure to terminate illegal transportation of hazardous waste, alleged failure to investigate the generation, origin, ownership, transportation, storage and disposal of overpacked drums, alleged failure to test the contests of the drums or reveal the results of the tests, and alleged supervision of the removal and transfer of hazardous waste - all concern activities clearly within the scope of the agents' official duties. Under these circumstances, any judgment in favor of Plaintiffs would operate against the DEP itself. The relief requested by Plaintiffs, if granted, would affect matters of public administration and would essentially compel the Pennsylvania DEP to take action. For these reasons, we

agree with the Commonwealth Defendants that the claims against Defendants Wozniak and Holler are, in actuality, claims against the DEP -- and hence, the Commonwealth. Accordingly, these claims are barred by the Eleventh Amendment unless the claims against Holler and Wozniak are sufficient to fall within the narrow exception of Ex Parte Young, 209 U.S. 123 (1908).

Under the doctrine set forth in Ex Parte Young, Eleventh Amendment immunity may be lifted where a claim is brought against a state official seeking only prospective injunctive relief in order to prevent the enforcement of an unconstitutional law, or to end a continuing violation of federal law by the official. Green v. Mansour, 474 U.S. 64, 68 (1985) (citing Ex Parte Young, 209 U.S. at 155-56); Edelman v. Jordan, 415 U.S. 651, 664 (1974). We conclude that such relief is not available here for several reasons.

First, the doctrine of Ex Parte Young affords only prospective injunctive relief, as opposed to retrospective monetary relief. This is so because prospective injunctive relief is considered "necessary to vindicate the federal interest in assuring the supremacy of that law," but "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." Green, 474 U.S. at 68. In their Amended Complaint, Plaintiffs seek specific injunctive relief as against Defendant Rotocast only. (See Amended Complaint Ad Damnum Clause at ¶ A.) Beyond that, Plaintiffs' only prayer for prospective injunctive relief is the generic request that "Plaintiffs be awarded any and such other legal and equitable relief as this Court deems just and proper." (Id. at ¶ J.) The amended Complaint does not specifically identify any form of prospective relief as against the Commonwealth Defendants that would be appropriate under Ex Parte Young. In particular, Plaintiffs fail to identify any prospective unconstitutional conduct or continuing violations of federal law on the part of the Commonwealth Defendants. Even construing Plaintiffs' allegations as true and drawing all

reasonable inference in their favor, we perceive no allegation of a continuing federal violation; all averments relating to the Commonwealth's alleged inappropriate handling of hazardous wastes concern past actions that are not likely to recur.[7] Most notably, the overpacked drums which Plaintiffs claim to have spotted on the adjacent Coombs property and which are identified as the possible source of contamination have allegedly long since been removed from that site. Although Plaintiffs do request certain forms of damages against all Defendants, including the Commonwealth Defendants (see Ad Damnum Clause at ¶ D, E, F, H, and I), money damages for past violations of federal law are not available in suits brought under the Ex Parte Young doctrine. Green, 474 U.S. at 68; Quern v. Jordan, 440 U.S. 332, 337-38 (1979); Edelman v. Jordan, 415 U.S. 651, 664-65, 668, 678 (1974); Allegheny Cty. Sanitary Auth. V. U.S. E.P.A., 732 F.2d 1167, 1174 (3d. Cir. 1984). We note that Plaintiffs have also requested declaratory relief in the form of an order that would: "(1)) Declare Defendants strictly liable for all costs of response; (2) Declare Defendants in violation of RCRA, for storing and disposing of 'hazardous wastes' ... and operating a facility in violation of RCRA and its regulations; (3) Declare Defendants liable to Plaintiffs in equitable indemnity, trespass and nuisance." (Ad damnum clause at ¶ G.) However, the requested declaratory relief would do nothing more than establish the Commonwealth's liability for alleged past violations of federal and state law. Ex Parte Young does not apply where "the issuance of a declaratory judgment ... would have much the same effect as a full-fledged award of damages or restitution by the federal court, that latter kinds of relief being of course prohibited by the Eleventh Amendment." Green, 474 U.S. at 73. In sum, the Court perceives no basis here for the type of prospective relief contemplated by the Ex Parte Young doctrine.

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[7] To the extent that Plaintiffs would premise a continuing federal violation on the DEP's failure to remediate the alleged contamination on the Grines' property, we conclude -- for reasons discussed below -- that this is not an appropriate basis for relief under Ex Parte Young.

Second, the Ex Parte Young doctrine affords an injunctive remedy only with respect to conduct that is ministerial, not discretionary, in nature:

> There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action. In that case, the court can direct the defendant to perform this merely ministerial duty.

209 U.S. at 158 (citing omitted). To the extent that Plaintiffs seek prospective relief against the Commonwealth DEP and its agents here, the requested relief concerns conduct that is discretionary on the part of the DEP. Plaintiffs complain that the DEP did not act to prohibit the illegal dumping, did not seize the overpacked drums as evidence, have not acted to abate the imminent hazard on Plaintiffs' property, and have not otherwise enforced applicable provisions of the federal environmental laws. In essence Plaintiffs' claims against the Commonwealth Defendants are directed at the DEP's alleged failure, through its agents, to adequately enforce the federal environmental laws. However, decisions regarding when and how to enforce the environmental laws is discretionary with the DEP and its officials. See Proffitt v. Davis, 707 F. Supp. 182, 187 (E.D. Pa. 1989) (recognizing discretionary nature of agency's decision not to pursue a particular course of enforcement and holding that citizen suits provisions of RCRC and CWA provide no jurisdictional basis for action seeking to compel the Secretary of DER to enforce compliance with those statutes). The limited exception to Eleventh Amendment immunity carved out by Ex Parte Young was not intended to direct the conduct of state officials in carrying out their discretionary functions. 209 U.S. at 158-59.

For all of the foregoing reasons, we conclude that this Court lacks subject matter jurisdiction over Plaintiffs' federal environmental claims insofar as they are directed against the Commonwealth Defendants.

2. Plaintiffs' State Law Claims

Turning next to Plaintiffs' state law claims against the Commonwealth Defendants, we conclude that these claims are also barred by the Eleventh Amendment. "[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when -- as here -- the relief sought and ordered has an impact directly on the State itself." Pennhurst State School & Hosp. V. Halderman, 465 U.S. 89, 117 (1984) ("Pennhurst II"). Whether or not jurisdiction exists as to other claims in the case is "inconsequential -- the principle applies as well to state law counts brought into federal court under pendent jurisdiction." Allegheny Ct. Sanitary Auth., 732 F.2d at 1173. See also Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1176 (3d Cir. 1987) (Eleventh Amendment, absent state consent, precludes federal courts from entertaining pendent state law claims against state agencies and officers seeking relief for violations of state law) (citation omitted). Because we have previously determined that the allegations against the Commonwealth Defendants are directed at the DEP itself, through Wozniak and Holler acting in their official capacities, Plaintiffs' state law claims impact on the Commonwealth and are barred by Eleventh Amendment immunity.

Plaintiffs argue that the Commonwealth has consented to the suit of its agencies under the Pennsylvania Hazardous Sites Cleanup Act, 35 Pa. C.S.A. §§ 6020.101 et seq. (Purdons 1993), thereby suggesting that this Court has jurisdiction over that claim against the Commonwealth Defendants. However, it appears that Plaintiffs' Count III asserts a PHSCA claim only as against Defendant Coombs, Yost, Shrum, and Rotocast. The Commonwealth Defendants

are not named in that particular count. (See Amended Complaint ¶ 100.) Thus, for purposes of determining the Commonwealth Defendants' amenability to suit in federal court for state law violations, the PHSCA claim would appear irrelevant.

Assuming arguendo that the Commonwealth Defendants had specifically been named under Count III, we would nevertheless conclude that Eleventh Amendment immunity bars such a claim in federal court. In support of their argument that this Court has jurisdiction over the Commonwealth Defendants under PSCA, Plaintiffs rely heavily on Reading Co. v. City of Philadelphia, 829 F. Supp. 127 (E.D. Pa. 1993). In Reading Co., the district court utilized a two-step analysis in concluding that the PHSCA specifically waives the Commonwealth's sovereign immunity. The court first observed that the Act repeatedly imposes liability on any "person" who engages in certain types of conduct. See 829 F. Supp. At 130 (citing 35 Pa. Stat. §§ 6020.701(a), 6020.702(a), 6020.705(a). The court then focused on the statutory definition of "person," which specifically includes "... state governments, and political subdivisions." Id. (citing 35 Pa. Stat. §6020.103). However, even if we were to agree with the Reading Co. court's conclusion that the PHSCA specifically waives the Commonwealth's sovereign immunity under Pennsylvania law -- an issue which this Court need not reach -- that would not end our inquiry. The mere fact that a sate has consented to be sued does not mean it has consented to be sued in federal court, for "a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." Atascadero State Hosp. V. Scanlon, 473 U.S. 234, 241 (1985) (quoting Pennhurst II, 465 U.S. at 99) (emphasis in original). Indeed, the Pennsylvania Legislature has expressly preserved the Commonwealth's immunity from suit in federal court:

> (a) General rule. --Except as otherwise provided in this subchapter, no provision of this title shall

> constitute a waiver of sovereign immunity for the purpose of 1 Pa. C.S. § 2310 (relating to sovereign immunity reaffirmed; specific waiver) or otherwise.
>
> (b) *Federal Courts. -- Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States.*

42 Pa. C.S.A. § 8521 (Purdons 1996) (emphasis supplied). See also Pennhurst II, 465 at 103 n.12 (citing § 8521(b) and rejecting the argument that Pennsylvania has waived its immunity from suit in federal court). The Commonwealth's general sovereign immunity statute explicitly states that "[w]hen the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought *only in such manner and in such courts and in such cases as directed by the provisions of Title 42 ... unless otherwise specifically authorized by statute.* 1 Pa. C.S.A. § 2310 (Purdons 1995) (emphasis supplied). The citizen suit provision of the PHSCA states "[t]the courts of common pleas shall have jurisdiction over any actions authorized under this section," 35 Pa. Stat. Ann. § 6020.1115(b) (Purdons 1993), but it makes no reference to -- and certainly does not "specifically authorized" -- suit in federal court. This Court is therefore hard-pressed to glean from these collective provisions a waiver of the Commonwealth's Eleventh Amendment immunity for the purposes of citizen suits under the PHSCA. See Atascadero State Hosp., 473 U.S. at 241 ("[I]n order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court.*") (emphasis in original).

Nor do we agree with Plaintiffs' position that the Reading Co. court "state[d] categorically that the Eleventh Amendment does not protect state agencies from suit in

Federal Court." (See Pl.s' Br. In Response to Commwealth's Mot. to dismiss at p. 12.) In Reading Co., the district court ruled that Pennsylvania's law of sovereign immunity did not bar a claim against the defendant, Southeastern Pennsylvania Transportation Authority ("SEPTA"), under PHSCA. See 829 F. Supp. At 129-31. What the Reading Co. court did not address, because it was not an issue in the case, is whether the Eleventh Amendment protects SEPTA from suit in federal court. See id. at 129 n.1 ("What is at issue in the instant motion is not whether SEPTA is entitled to Eleventh Amendment protection, but rather *whether Pennsylvania's law of sovereign immunity* protects SEPTA from [P]HSCA claims.") (emphasis supplied). The distinction is significant. Under Third Circuit precedent, federal courts use a somewhat detailed inquiry to determine whether an entity qualifies as an alter ego of the Commonwealth for purposes of Eleventh Amendment immunity. See Bolden v. Southeastern Pennsylvania Transportation Authority, 953 F.2d 807, 818-21 (3d Cir. 1991); Fitchik v. New Jersey Transit Rail Operations, 873 F.2d 655, 659-64 (3d Cir. 1989), cert. denied, 493 U.S. 850 (1989). The Reading Co. court did not need to consider whether SEPTA -- an entity created by the Commonwealth to provide public transportation in the Southeastern Pennsylvania region -- qualified for Eleventh Amendment immunity because the Third Circuit had already resolved that issue unfavorably to SEPTA in a prior en banc decision. See Bolden, 953 F.2d at 821 (quoted in Reading Co., 829 F. Supp. At 129 n.1).[8] What the Reading Co. court actually determined is that, for purposes of *Pennsylvania sovereign immunity principles*, SEPTA is amenable to suit under the PHSCA. Nowhere in its decision did the Reading Co. court go so far as to hold that the

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[8] By contrast here, there is little doubt that the DEP constitutes a mere alter ego of the Commonwealth for purposes of Eleventh Amendment immunity. See Fiore v. Kelly Run Sanitation, Inc., 609 F. Supp. 909, 912 (W.D. of Pa. 1985) (recognizing that the state DER, as an agency of the state itself, may not be sued in federal court unless the state has waived its Eleventh Amendment immunity or Congress has subjected states to suit pursuant to Section 5 of the Fourteenth Amendment).

Eleventh Amendment never applies in PHSCA suits against state agencies in a federal court. Moreover, to the extent that Reading Co. can be read as implicitly holding that the PHSCA waives Eleventh Amendment immunity for all state agencies, we are neither bound by -- nor persuaded by -- that conclusion. As previously noted, the PHSCA waives the Commonwealth's immunity to be suit in state common pleas courts. Under 1 Pa. C.S.A. § 2310 and 42 Pa. C.S.A. § 8521(b), however, that waiver may not be read expansively so as to include suit in federal court. See Oley Twp. V. Delaware River Basin Comm'n, 906 F. Supp. 284, 287 (E.D. Pa. 1995) ("The standard for finding waiver [of Eleventh amendment immunity] is stringent as the state's consent must be by the 'most express language or by such overwhelming implications from the test as [will] leave no room for any other reasonable construction.'") (quoting Atascadero, 473 U.S. at 239-240) (second alteration in original).

Finally, Plaintiffs cite to several cases purportedly in support of the proposition that the DEP and its agents may be liable under CERCLA and/or the PHSCA as potential "owners" or "operators" of the Site in question. See, e.g., FMC Corp. v. U.S. Dept. of Commerce, 29 F.3d 833 (3d Cir. 1994); United States v. Carolina Transformer Co., 978 F.2d 832, 836-37 (4th Cir. 1992); General Electric Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286 (2d Cir. 1992); Apex Oil Co. v. United States, 530 F.2d 1291, 1293 (8th Cir. 1976), cert. denied, 429 U.S. 827 (1976); Prisco v. State of New York, 902 F. Supp. 400 (S.D. N.Y. 1995); United States v. Iron Mountain Mines, Inc., 881 F. Supp. 1432, 1448 (E.D. Cal. 1995); United States v. Atlas Minerals and Chem., Inc., 797 F. Supp. 411, 420 (E.D. Pa. 1992); In re Paoli R.R. Yard PCB Litigation, 790 F. Supp. 94, 95-96 (E.D. Pa. 1992), aff'd, 980 F.2d 724 (3d Cir. 1992). This argument is unavailing.

First, as we have previously discussed, following the Supreme Court's decision in Seminole Tribe, it appears that any attempt by Congress to abrogate the States' Eleventh Amendment Immunity pursuant to the Commerce Clause of

Article I of the U.S. Constitution is invalid. Accordingly, for the reasons previously stated, and because we have found no applicable exception under Ex Parte Young, Plaintiffs' claims against the Commonwealth Defendants under CERLCA, RCRA, and CWA are barred by the Eleventh Amendment. Notably, all of the cases cited by Plaintiffs in support of its "owner/operator" liability theory predate the Supreme Court's decision in Seminole Tribe. Therefore, these cases can provide little guidance on the issue of Eleventh Amendment immunity following Seminole Tribe. Plaintiffs' remaining arguments in opposition to dismissal of their CERCLA, RCRA, and CWA claims are unconvincing.

With respect to Plaintiffs' claims under the PHSCA, we note that the Commonwealth Defendants are not named as Defendants under that specific count. Even if they were, however, we have determined that the PHSCA does not waive the Commonwealth's immunity from suit in federal court under the Eleventh Amendment. Plaintiffs have advanced no argument as to why the remainder of their state claims against the Commonwealth would not be barred by the Eleventh Amendment, and we cannot conceive of one.

Because Eleventh Amendment immunity bars both Plaintiffs' federal and state claims against the Commonwealth, this Court is without subject matter jurisdiction. The Court therefore need not address the Commonwealth Defendants' alternative arguments for dismissal.

III. CONCLUSION

Based upon the foregoing reasons, we will dismiss the Plaintiffs' claims against the Commonwealth Defendants with prejudice.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al., Plaintiffs	)	
vs.	)	Civil Action No. 95-342 Erie
WILLIAM R. COOMBS, et al., Defendants	)	

ORDER

AND NOW, this 31st day of December, 1996, for the reasons stated in the accompanying Memorandum Opinion,

IT IS HEREBY ORDERED that the Commonwealth Defendants' Motion [Doc. No. 20] to Dismiss Amended Complaint is GRANTED and all claims against the Commonwealth Department of Environmental Protection, Gary Wozniak and Daniel Holler are dismissed with prejudice.

/s/_____
Sean J. McLaughlin
United States District Judge

cm: All parties of record. /s/TH

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al.,	)	
Plaintiffs	)	
vs.	)	Civil Action No. 95-342 Erie
	)	
WILLIAM R. COOMBS, et al.,	)	
Defendants	)	

MEMORANDUM OPINION

McLAUGHLIN, District J.

Presently pending before the court in the above-captioned matter is a motion by the Plaintiffs seeking reconsideration of this Court's Memorandum Opinion and Order of December 31, 1996 and a separate order entered on February 9, 1998. For the reasons set forth below, we will amend our prior order of December 31, 1996 such that Plaintiffs' state law claims against the Commonwealth Defendants are dismissed without prejudice. In all other respects, Plaintiffs' motion for reconsideration will be denied.

I. PROCEDURAL HISTORY

Plaintiffs in this action are property owners in Tionesta Borough, Pennsylvania. They claim that their property has been contaminated with various hazardous chemicals and pollutants at the hands of their up-gradient neighbors, William R. Coombs and Billie M. Yost. On April 2, 1996, Plaintiffs filed a nine-count Amended Complaint, in which they named as Defendants Coombs, Yost, and various other public and private individuals and entities. Among the nine causes of action asserted in the Amended Complaint are federal law claims under the

Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. §§6901 *et seq.* (West 1995), the Federal Water Pollution Control Act ("Clean Water Act") or "CWA"), 33 U.S.C.A. §§1251, *et seq.* (West 1986), and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA", 42 U.S.C. §§9610 *et seq.* (West 1995), as amended by the Superfund Amendments and Reauthorization Act of 1986.

By Memorandum Opinion and Order entered on December 31, 1996, this Court dismissed all of the claims against the Commonwealth of Pennsylvania Department of Environmental Protection ("DEP") and two of its agents, Defendant Daniel Holler and Gary Wozniak (collectively referred to as the "Commonwealth Defendants"). Although the Commonwealth Defendants asserted numerous bases for dismissal, the Court ultimately disposed of the claims on Eleventh Amendment immunity grounds. With respect to the claims against the DEP itself, the Court found that the DEP, as an arm of the Commonwealth, was immune from suit in federal court under the Eleventh Amendment. We determined, in light of the Supreme Court's decision in Seminole Tribe of Florida v. Florida, -- U.S. --, 116 S. Ct. 1114 (1996), that Congress's attempt to abrogate Eleventh Amendment immunity under the federal environmental laws was not done pursuant to any valid exercise of constitutional authority. Therefore, we reasoned, the Commonwealth's sovereign immunity -- having been neither waived by the Commonwealth nor validly abrogated by Congress -- remained intact. Plaintiffs do not appear to challenge this portion of the Court's ruling.

We then considered the potential liability of Defendants Holler and Wozniak. Initially, we determined that the claims against Holler and Wozniak were essentially directed at actions taken by them in their official capacity as agents of the DEP. We concluded that the Commonwealth was the real party in interest and that, consequently, the Eleventh Amendment barred any recovery by Plaintiffs for

retrospective relief or damages under their federal causes of action.

The Court next considered whether any prospective relief was appropriate under the doctrine of Ex Parte Young, 209 U.S. 123 (1908). We considered the nature of Plaintiffs' claims by examining the allegations in their Amended Complaint. In particular, we noted that Plaintiffs had not identified any prospective unconstitutional conduct or continuing violations of federal law on the part of the Commonwealth officials. Instead, all averments relating to the officials' alleged misconduct appeared to involve past conduct. To the extent that Plaintiffs' claims were premised upon the Commonwealth Defendants' continuing failure to adequately investigate and/or remediate the alleged contamination, we concluded that Ex Parte Young did not provide a basis for prospective relief under the federal environmental statutes at issue. See Proffit v. Davis, 707 f. Supp. 182, 187 (E.D. Pa. 1989) (recognizing discretionary nature of agency's decision not to pursue a particular course of enforcement and holding that citizen suits provisions of RCRA and CWA did not provide a jurisdictional basis for action seeking to compel Secretary of DER to enforce compliance with those statutes).

Finally, with respect to Plaintiffs' state law claims, we noted that the Eleventh Amendment also bars any suit in federal court against the Commonwealth for alleged violations of state law. Further, the narrow exception of Ex Parte Young does not apply to Plaintiffs' state law claims. Based on the foregoing reasons, we dismissed Plaintiffs' claims against the Commonwealth Defendants with prejudice by order dated December 31, 1996. Plaintiffs subsequently sought to appeal the ruling, but the Third Circuit Court of Appeals dismissed the appeal as premature.

Thereafter, on December 18, 1997, Plaintiffs filed a motion for an order adjudging the Commonwealth Defendants and the United States Environmental Protection

Agency[1] in civil contempt ("contempt motion"). This motion is generally based on the governmental Defendants' alleged failure to turn over documents and information to which Plaintiffs claim they are legally entitled. By order dated February 9, 1998, this Court directed that the hearing on Plaintiffs' civil contempt motion would be limited in scope to allegations concerning the conduct of the EPA and not the Commonwealth Defendants, as the Commonwealth Defendants had previously been dismissed from the case on Eleventh Amendment immunity grounds.

Meanwhile, on February 23, 1998, Plaintiffs filed the instant motion for reconsideration of both the December 31, 1996 order dismissing the Commonwealth Defendants from the case and the February 9, 1998 order limiting the scope of the hearing on Plaintiffs' contempt motion. Plaintiffs represent that the instant motion for reconsideration is grounded upon:

> Intervening legal developments in the form of a Supreme Court decision which challenges the propriety of the Court's original ruling, and the discovery of new evidence that the DEP withheld from Plaintiffs the data necessary for validation of test results, in the fac[e] of its representation to the Court and to Plaintiffs that all information relating to contaminants on the Coombs and Grine sites was made accessible to Plaintiffs.

(See Pl.'s Mot. at pp. 2-3.) In addition, Plaintiffs raise various procedural objections to the court's decision to dismiss the Commonwealth Defendants.

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[1] Plaintiffs filed a claim against the United States EPA under the Freedom of Information Act, 5 U.S.C.A. §552 (West 1996 and 1998 Supp.). The motions relative to the claims against the EPA are dealt with in a separate memorandum opinion.

II. TIMELINESS AND STANDARD OF REVIEW

As a preliminary matter, we must determine the correct procedural framework for addressing the instant motion. The Commonwealth Defendants contend that reconsideration is only proper, if at all, pursuant to Rules 59(e)[2] or 60(b)[3] of the Federal Rules of Civil Procedure. Defendants further contend that, under either rule, the motion for reconsideration is untimely. Plaintiffs' motion was filed more than 13 months after the entry of the original order which is now being challenged. Rule 59(e) requires that a motion to amend or alter a judgment be brought within ten days after entry of the judgment. See Fed. R. Civ. P. 59(e). Rule 60(b) requires that motions be brought "within a reasonable time" and, for motions based upon subsections (1), (2) or (3), within a year of entry of the judgment. See Fed. R. Civ. P. 60(b).

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[2] Rule 59(e) provides as follows:

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.
Fed. R. Civ. P. 59(e).

[3] Rule 60(b) provides, in relevant part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or parties legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; ... or (6) any other reason justifying relief from the operation of judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Fed. R. Civ. P. 60(b).

However, both Rules 59(e) and 60(b) apply only where the subject order is final, as opposed to interlocutory. See Confer v. Custom Eng. Co. Employee Health Benefit Plan, 760 F. Supp. 75, 77 (W.D. Pa. 1991), aff'd in part, appeal dismissed in part, 952 F.2d 41 (3d Cir. 1991). The Court's order of December 31, 1996 disposed only of the claims against some, but not all, of the named Defendants. Therefore, the operative rule here is Rule 54(b):

> **(b) Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, ... or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the right sand liabilities of all the parties.

Fed. R. Civ. P. 54(b). Because the order of December 31, 1996 was never certified by this Court as a final judgment, the order remained interlocutory[4] and, by the express terms of this rule, is subject to revision at any time prior to final adjudication of all the claims and the rights and liabilities of all the parties. Fed. R. Civ. P. 54(b). See Confer, 760 F. Supp. At 77 (where defendants sought reconsideration as to partial

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[4] Indeed, when the Plaintiffs sought to take an appeal from the decision, the appeal was considered interlocutory and was therefore dismissed by the Third Circuit Court of Appeals for lack of jurisdiction.

judgment in favor of some but not all plaintiffs, the only vehicle for reconsideration was Rule 54). We therefore conclude that the motion for reconsideration is timely under Rule 54(b).

The next issue is the standard of review which ought to be applied to the instant motion. Although "[t]he standard for granting a motion for reconsideration under Rule 54 is undoubtedly less rigid than under 60(b)," Confer, 760 F. Supp. At 77 (citing Fed. R. Civ. P. 60(b) Advisory Committee's Notes; Farr Man & Co., Inc. v. M/V Rozita, 903 F.2d 871 (1st Cir. 1990)), courts attach "considerable import" to the rendering of a judgment, whether or not it is final. See id. Accordingly, reconsideration of our prior decision is only appropriate in order to correct manifest errors of law or fact or to consider newly discovered evidence relating to the prior decision. Id. (citing Harsco Corp. v. Zlotnick, 779 f.2d 906 (3d Cir. 1985)).[5] With this standard in mind, we turn to the substance of Plaintiffs' motion for reconsideration.

III. DISCUSSION

Plaintiffs represent that their motion is grounded upon "intervening legal developments" which cast doubt on the propriety of this Court's previous ruling. They also claim to have new evidence indicating that the DEP has withheld data which Plaintiffs feel was necessary in order for them to verify the soil, water, and sludge testing performed by the DEP both on their property and on the up-gradient Coombs property. Finally, Plaintiffs have lodged various objections which can broadly be described as

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[5] The same standard would apply if we were to entertain reconsideration under the "law of the case" doctrine. See Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 116-17 (3d Cir. 1997) (notwithstanding the "law of the case" doctrine, courts are warranted in reconsidering issues previously decided in the course of litigation where "extraordinary circumstances" exist, e.g. where: (1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice).

procedural objections. We will first consider Plaintiffs' arguments as they relate to our ruling of December 31, 1996 by which we dismissed the claims against the Commonwealth Defendants. We will then consider the Plaintiffs' arguments as they relate to our February 9, 1998 ruling defining the scope of the contempt hearing.

1. Plaintiffs' Motion for Reconsideration of the Order of December 31, 1996

A.

We first consider whether supervening "new law" requires a modification of the December 31, 1996 opinion and order. Although Plaintiffs base their motion in part upon "intervening legal developments," it is not clear in what respect Plaintiffs feel the relevant law underlying our previous decision has changed. Plaintiffs refer the Court to a recent Supreme Court decision, Idaho v. Coeur d'Alene Tribe of Idaho, -- U.S. --, 117 S. Ct. 2028 (1997). That case involved a lawsuit brought by a federally recognized Indian tribe against the State of Idaho, various state agencies, and various state officials in their individual capacities. The tribe alleged ownership in submerged lands and the bed of a lake and its tributaries which were within the 1873 boundaries of its reservations. A majority of the Court ruled that the Eleventh Amendment barred a federal court from hearing the tribe's claim. Insofar as the claims were asserted against state officials in their individual capacities, a majority held that no relief was available under the doctrine of Ex Parte Young.

In Coeur d'Alene, Justice Kennedy, as author of the principal decision, sought to articulate an individualized standard for applying the doctrine of Ex Parte Young. He advocated an approach that would consider, on a case-by-case basis, "the real affront to a State of allowing a suit to proceed" on the basis of prospective relief. 117 S. Ct. at 2038. However, only Justice Rhenquist adopted the approach

outlined by Justice Kennedy. Three justices -- O'Connor , Scalia and Thomas -- concurred in the judgment but declined to join in that portion of the principal decision which advocated a "case-by-case" (rather than a rule-based) approach to Ex Parte Young. Accordingly, there appears to be a consensus among the lower federal courts that, following Coeur d'Alene, "a majority of the [Supreme] Court would continue to apply the rule of Ex [P]arte Young as it has been traditionally understood." See Earles v. State Bd. of CPAs of Louisiana, 139 F.3d 1033, 1039 (5th Cir. 1998) (citing cases), reh'g and suggestion for reh'g en banc denied, No. 97-30159, -- F.3d -- (5th Cir. 1998) (Table Case). In sum, then we do not perceive any significant change in the jurisprudence of Ex Parte Young and its progeny, and Plaintiffs, although professing a change in the law, have not specified how the recent Supreme Court decision requires a different result. They appear to rely on Coeur d'Alene for the proposition that, when no state forum is available to vindicate federal interests, a special obligation is placed upon district courts to ensure the supremacy of federal statutory and constitutional law. Thus, Plaintiffs reason, prospective relief under Ex Parte Young is particularly appropriate here, since their federal claims cannot be entertained in state court. (Pl.s' Mot. For Reconsideration at 16.) However, we note once again that part of the principal decision on which Plaintiffs rely, 117 S. Ct. at 2035, was adopted only by Justices Rhenquist and Kennedy. As such, it does not constitute a majority ruling or binding precedent.

B.

Plaintiffs also contend that the Court erred in finding that there was no basis for relief under the doctrine of Ex Parte Young. They claim Defendants Holler and Wozniak have committed on-going violations of federal law for which prospective relief is appropriate, *to wit*:

> ...agents of the DEP, with knowledge that listed hazardous substances were

> detected in the drums, secretly assisted Defendant Coombs in moving them off-site, without a permit, to his home in McDonald, PA. No administrative on-the-record order authorized this illegal transport of hazardous materials. Transport of unpermitted and listed hazardous materials is an ongoing violation of federal law ...

(Pl.s' Mot. for Reconsideration at 17.)

We find this proffer insufficient as a basis for reconsideration. Even assuming *arguendo* the truth of the allegation, it is not clear in what respect Plaintiffs can be said to have suffered injury as a result of the alleged transportation of offensive barrels *from* Coombs's campsite in Tionesta Borough *to* Coombs's residence in McDonald, Pennsylvania. Given that the basis of this entire lawsuit is the alleged presence of hazardous substances on the Coombs campsite, which (according to Plaintiffs) have allegedly contaminated their down-gradient property, the removal of the alleged hazardous substances from the campsite would appear to benefit Plaintiffs, not harm them. To the extent that Plaintiffs are complaining that the alleged movement of the barrels was a *per se* violation of RCRA because it constituted a transfer of hazardous waste without a permit, Plaintiffs have not demonstrated that they have standing to pursue such a claim. "Congress' provision for citizen suits does not, in itself, establish Article III standing." Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc. (hereinafter "PIRG of New Jersey"), 123 F.3d 111, 120 (3d Cir. 1997) (quoting Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1113 (4th Cir. 1988)). In order to successfully assert a claim under the citizen suit provisions of the federal environmental laws, a plaintiff must establish that he or she has standing by demonstrating: (I) an injury in fact, i.e. an invasion of a legally protected interest which is concrete and particularized and actual or imminent; (ii) a

causal link between the defendant's conduct and the injury, such that the conduct is "fairly traceable" to that conduct; and (iii) the likelihood that judicial relief will redress the plaintiff's injury. See PIRG of New Jersey, 123 F.3d at 117, 199. Assuming for the moment that Plaintiffs can prove that the DEP agents secretly assisted Defendant Coombs in removing toxin-containing barrels to another location remote from Plaintiffs' property, they have not demonstrated or even alleged any injury or threat of injury resulting from this alleged unpermitted transfer.[6] PIRG of New Jersey, 123 F.3d at 120 (Clean Water Act does not authorize private causes of action against polluters absent some showing of injury or threat of injury); Pape v. Lake States Wood Preserving, Inc., 948 F. Supp. 697, 700 (W.D. Mich. 1995) (plaintiff had no standing to bring RCRA citizen suit where he lived 150 miles from site of defendant's alleged pollution and failed to demonstrate threat of imminent personal injury), aff'd, 98 F.3d 1342, 1996 WL 571306 (6th Cir. 1996) (TABLE NO. 95-2266) (noting that plaintiff had not provided any evidence to support his allegation that the defendant polluted the area surrounding his property). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 566-67 (1992) (plaintiffs had not standing to enforce Endangered Species Act where they lacked any connection to the situs of injury). C.f. Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1322 (7th Cir. 1992) (citizens' group had standing to pursue RCRA claim where it represented persons living close to the alleged situs of pollution who were subject to the potential injury), reh'g and reh'g en banc denied, October 5, 1992.

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[6] To the extent that Plaintiffs' injury is premised upon the DEP's alleged failure to adequately investigate and/or to preserve this evidence, such a claim is insufficient as a basis for reconsideration. As we previously discussed in our December 31, 1996 memorandum opinion, the citizen suit provisions of RCRA, CERCLA and CWA do not provide a mechanism for challenging the DEP's investigative or regulatory measures.

C.

Plaintiffs have also raised several procedural objections to the Court's December 31, 1996 decision. They claim, for example, that they have been denied due process inasmuch as they were never put on notice that the Court would entertain a dismissal under Fed. R. Civ. P. 12(b)(1). Plaintiffs suggest that they were unfairly surprised because the Commonwealth Defendants' original motion to dismiss never cited Federal Rule 12(b)(1) as a basis for dismissal. This assertion borders on absurd and is easily disposed of. In their original papers moving for dismissal, the Commonwealth Defendants spelled out several grounds on which they believed dismissal was warranted. Among other things, the Commonwealth Defendants argued that they were immune from suit in federal court under the Eleventh Amendment to the U.S. Constitution and that Plaintiffs failed to identify a viable cause of action against them in the Amended Complaint. Plaintiffs responded to these arguments in their brief opposing the motion to dismiss. It is unfathomable that Plaintiffs can now argue that they were surprised that the Court considered the issue of Eleventh Amendment immunity. And, while the Commonwealth Defendants may not have specifically cited Fed. R. Civ. P. 12(b)(1) in their motion to dismiss, it should not have been surprising to Plaintiffs that the Court would analyze the Eleventh Amendment issue under that particular rule. Although the Eleventh Amendment is not strictly jurisdictional, it creates sovereign immunity which partakes of jurisdictional qualities. See e.g., Sullivan v. Barnett 139 F.3d 158, 179 (3d Cir. 1998) ("At this juncture, we raise an Eleventh Amendment sovereign immunity issue sua sponte as it is relevant to our jurisdiction over the Commonwealth Defendants."), pet. for cert. filed, June 11, 1998. Thus, federal courts have treated Eleventh Amendment immunity as a jurisdictional issue that can be raised sua sponte, even for the first time at the appellate level. See Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n of Commonwealth of Pa., 141 F.3d 88, 91 (3d Cir. 1998); Sullivan, 139 F.3d at 179

(citing cases); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 131 F.3d 353, 365 (3d Cir. 1997) ("Because the [Eleventh Amendment] immunity issue 'sufficiently partakes of the nature of a jurisdictional bar,' ... it is an issue that may be raised at any time during the pendency of the case.") (internal citation omitted), pet. for cert. filed, 67 U.S.L.W. 3084 (July 17, 1998). Furthermore, numerous federal courts have entertained motions to dismiss on sovereign immunity grounds under the rubric of Fed. R. Civ. P. 12(b)(1). See e.g., Williams v. United States, 50 F.3d 299, 304-05, 307 (4th Cir. 1995); Union Pacific R.R. Co. v. Burton, 949 F. Supp. 1546, 1552 (D. Wyo. 1996); Hines v. Irvington Counseling Ctr., 933 F. Supp. 382, 387-88 (D.N.J. 1996) (addressing federal government's sovereign immunity); Taylor v. Commonwealth of Virginia, Dept. of Transportation, 170 F.R.D. 10, 13 (E.D. Va. 1996); Radeschi v. Commonwealth of Pennsylvania, 846 F. Supp. 416, 418-19 (E.D. Pa. 1993). See also 5A Charles Alan Wright and Arthur R. Miller, Federal Practice & Procedure §1350 (1990 & 1998 Supp.) (Rule 12(b)(1) motion to dismiss for lack of jurisdiction over subject matter may also be appropriate when plaintiff's claim is barred by sovereign immunity). Moreover, even if it could be said that this Court erred in analyzing the Eleventh Amendment immunity issue under rule 12(b)(1), the error would be a harmless one of form over substance. Plaintiffs were aware of the Defendants' Eleventh Amendment immunity argument and responded to it as they saw fit in their oppositional brief. In addition, Plaintiffs received the benefit of certain procedural safeguards. In addressing the Commonwealth Defendants' motion to dismiss, the Court interpreted the averments in Plaintiffs' Amended Complaint as true and drew all reasonable factual inferences from the complaint in the light most favorable to them. See Radeschi, 846 F. Supp. At 419 (court may dismiss an action for lack of subject matter jurisdiction based on facial challenge to complaint only if it affords the plaintiff the safeguard of accepting all allegations of the complaint as true, drawing reasonable factual inferences from the complaint in plaintiff's favor, and only if

it appears to a certainty that the pleader will not be able to assert a colorable claim of subject matter jurisdiction). The Court also recognized that the Commonwealth Defendants, as proponents of Eleventh Amendment immunity, bore the burden of proving the applicability of that doctrine.[7] In short, Plaintiffs were plainly put on notice of the Eleventh Amendment immunity argument and cannot be heard to claim unfair surprise or other prejudice.

Plaintiffs also generally object that the Court, prior to entering a dismissal on the grounds of Rule 12(b)(1), was required to hold an evidentiary hearing to resolve disputed issues of material fact. The Third Circuit has recognized that "when there is a factual question about whether a court has jurisdiction, the trial court may examine facts outside the pleadings and thus 'the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56 ... in such a circumstance, a trial court 'is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" Robinson v. Dalton, 107 f.3d 1018, 1021 (3d Cir. 1997) (internal citation omitted). However, in light of the procedural posture of this case, Plaintiffs' contention that the Court was required to hold an evidentiary hearing is misplaced. The Court's decision was not premised upon resolution of any factual issues disputed by the parties. Rather, the Court's dismissal order was based upon purely legal principles which, we concluded, flowed ineluctably from the manner in which the Plaintiffs had pleaded their Amendment Complaint.[8]

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[7] See Op. of 12/31/96 at 12 n.5 (citing Christy v. Pennsylvania Turnpike Comm'n, 54 F.3d 1140, 1144 (3d Cir. 1995), cert. denied, -- U.S. --, 116 S. Ct. (1995)).

[8] Some of the purported factual disputes highlighted by Plaintiffs in their motion for reconsideration concern new averments of misconduct allegedly based on new evidence. For example, Plaintiffs claim to have uncovered new "material" evidence showing that the DEP agents have failed to produce the complete and unedited file relating to soil and/or water samples taken from their own property as well as from Coombs's property. They characterize this conduct as a deliberate attempt to

Plaintiffs further contend that this Court's dismissal of their claims with prejudice was erroneous, given that the dismissal was premised on jurisdictional grounds. The Court acknowledges that ordinarily, a dismissal based on lack of subject matter jurisdiction per Fed. R. Civ. P. 12(b)(1) is without prejudice and does not address the merits of the plaintiff's claims. See In re Orthopedic "Bone Screw" Products Liability Litigation, 132 F.3d 152, 155 (3d Cir. 1997). Here, however, a dismissal without prejudice serves no purpose, at least insofar as Plaintiffs' federal claims against the Commonwealth Defendants are concerned. Federal District courts have exclusive jurisdiction over private citizens' suits brought under RCRA, the Clean Water Act and CERCLA. See 42 U.S.C. §6972(a) (RCRA); 42 U.S.C. §9659(b)(1) and (c) (CERCLA); 33 U.S.C. §1365(a) and (c)(1) (CWA). We have determined, based on the allegations set forth in the Amended Complaint, that the Eleventh Amendment protects the Commonwealth Defendants from defending against this suit in federal court. Because Plaintiffs cannot bring their federal claims elsewhere, those claims are effectively barred. Dismissal of those claims without prejudice therefore serves no meaningful purpose. Nevertheless, we will amend our prior order of December 31, 1996 such that the dismissal of Plaintiffs' state law claims against the Commonwealth Defendants is without prejudice.

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conceal, lose or obscure testing events and the results of those tests. Plaintiffs claim, among other things, that Defendants Holler and Wozniak failed to take and preserve environmental samples, prematurely aborted their investigation before meaningful evidence of the source of the contamination could be found, concealed vital evidence relative to the source of the contamination, and destroyed or altered evidence relating to sample procurement. Even accepting these allegations as true for the moment, Plaintiffs have not explained how they give rise to a cause of action under RCRA, CWA or CERCLA (or their pendent state law claims), nor have they sought leave to amend their complaint to plead any other appropriate cause of action. The mere allegation of newly uncovered misconduct does not necessarily persuade the Court that its prior dismissal was erroneous unless Plaintiffs can demonstrate that the newly discovered misconduct provides them with a potentially viable cause of action.

2. *Plaintiffs' Motion to Reconsider the Order of February 9, 1998*

On January 17, 1998, Plaintiffs filed a motion requesting this Court to enter an order adjudging both the EPA and the Commonwealth Defendants in civil contempt ("contempt motion"). By order dated February 9, 1998, the Court directed that the upcoming hearing on Plaintiffs' contempt motion would be limited to consideration only of the conduct of the EPA. The Court excluded the Commonwealth Defendants from the scope of the hearing on the ground that the Court lacked jurisdiction over those Defendants following their dismissal from the case.

Plaintiffs claim, however, that they have discovered new evidence which purportedly shows that the DEP withheld and/or destroyed data relating to its investigation of the Plaintiffs' complaints. Plaintiffs claim that they were entitled to this data and that it was needed in order for them to confirm the results of various testing performed by the DEP officials. Ultimately, this discovery does not relate to any viable cause of action as originally pleaded in the Complaint or Amended Complaint. Therefore, it does nothing to advance this Court's jurisdiction over the Commonwealth Defendants.

Moreover, Plaintiffs cannot establish that the Commonwealth Defendants have violated a specific order of this Court. In order to establish the propriety of civil contempt, a plaintiff must prove three elements by clear and convincing evidence: (1) that a valid order of the court existed; (2) that the defendants had knowledge of that order; and (3) that the defendants disobeyed the order. Roe v. Operation Rescue, 54 F.3d 133, 137 (3d Cir. 1995). The terms of the order must be sufficiently clear and precise to give fair warning to the contemnor that he or she is in violation of the order. Harris v. City of Philadelphia, 47 F.3d 1342, 1349 (3d Cir. 1995) ("Specificity in the terms of consent decrees is a predicate to a finding of contempt ... because 'a person will

not be held in contempt ... unless the order has given him fair warning.'") (internal citation omitted), reh'g denied (Mar 16, 1995). Here, Plaintiffs have not demonstrated, or even alleged, that the Commonwealth Defendants are in violation of any court order.[9] Instead, Plaintiffs claim that counsel for the DEP made misrepresentations to this Court when, during a pretrial conference, he stated that he had voluntarily produced all relevant documentation in this agency's file concerning the Plaintiffs' case:

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> THE COURT: Well, then, it seems to me that the injunction hearing which we had previously scheduled for November 19th, given the fact that you have injunctive and damage claims and you have a request for jury trial, should not take place. And that is to say that this matter should be set down on our jury term which raises this issue. I assume that any discovery, tot he extent that there has been any discovery in the case, has been directed primarily at the issues which implicate the injunctive aspect of the case, is that correct?
>
> [Counsel for the EPA]: I believe so, judge.
>
> [Plaintiffs' counsel]: There has been no discovery taken.

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[9] Although the Plaintiffs' contempt motion and motion for reconsideration loosely refer to violations of this Court's "orders" or "directives" to produce documentation (see e.g., Pl.s' Mot. for Order Adjudging Def. in Civ. Contempt [Doc. No. 133] at 4; Pl.s' Mot. for Reconsideration [Doc. 151] at 12), Plaintiffs do not actually identify any specific order compelling the Commonwealth Defendants to disclose the information now sought by them. For its part, this Court is not aware of any such order.

> [Counsel for the Commonwealth Defendants]: *We sat here for a day, we gave the [P]laintiffs' counsel all of the records from our files ... even though I don't think this court had the authority to direct them, we volunteered to do it, we did. They had a whole day's worth, sitting here, getting documents. I don't know what else we have. We have given them everything.*

(Tr. Of 11/13/96 Pretrial Conference [Doc. No. 101] at 4-5 (emphasis supplied).)

The foregoing language does not, in our opinion, constitute any potential basis for finding the Commonwealth Defendants in civil contempt. At most, assuming the truth of Plaintiffs' averments, the Commonwealth Defendants failed to follow through with a decision to voluntarily produce certain documentation which they were under no formal obligation to produce.[10] Plaintiffs have not cited any authority for the proposition that such conduct can serve as a basis for civil contempt. Although they have referred the Court to Telluride Management Solutions, Inc. v. Telluride Investment Group, 55 F.3d 463 (9th Cir. 1995), that case is factually distinguishable in material respects and does not provide persuasive authority for relief sought here.

IV. CONCLUSION

In sum, for the reasons previously stated, the Court will grant the Plaintiffs' motion for reconsideration and amend its Order of December 31, 1996 to reflect that Plaintiffs' state law claims against the Commonwealth

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[10] We note that no formal discovery had been served on the Commonwealth Defendants and hence, there was no outstanding order form this Court compelling the disclosure of any documentation. Nor did Plaintiffs ever attempt to compel production by way of a subpoena duces tecum. Alternatively, Plaintiffs might have sought to obtain the desired documentation by enforcing their state law remedies under the Pennsylvania "Right to Know" Act. See PA. STAT. ANN. tit. 65, §§66.1 *et seq.* (West 1959 and 1998 Supp.).

Defendants are dismissed without prejudice. In all other respects, the Plaintiffs' motion for reconsideration is denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT W. GRINE, II, et al., Plaintiffs	)	
vs.	)	Civil Action No. 95-342 Erie
WILLIAM R. COOMBS, et al., Defendants	)	

ORDER

AND NOW, this 17th day of August, 1998, IT IS HEREBY ORDERS that Plaintiffs' Motion [Doc. No. 151] for Reconsideration is GRANTED and the Court's Order of December 31, 1996 is amended to the following extent: the Order will reflect that Plaintiffs' state law claims against the Commonwealth Defendants will be dismissed without prejudice. In all other respects, Plaintiffs' Motion [Doc. No. 151] for Reconsideration is DENIED.

IT IS FURTHER ORDERED that, upon consideration of the Commonwealth Defendants' Motion [Doc. No. 158] for Entry of Final Judgement Pursuant to Fed. R. Civ. P. 54(b) and the Plaintiffs' brief in opposition thereto, said motion is GRANTED. The Court finds that there is no just reason for delay and that entry of final judgment is warranted for the reasons set forth in the Defendants' motion and supporting brief.

IT IS THEREFORE ORDERED that the Court's Order of December 31, 1996, as amended herein, be entered as a final judgment in accordance with Rule 54(b) of the Federal Rules of Civil Procedure.

/s/_____
Sean J. McLaughlin
United States District Judge

cm: All counsel of record./TH/